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Supreme Court, U.S.
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NO. 02-1207

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

LEONARD A. PELULLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

I. Pursuant to *Miller-El v. Cockrell*, – U.S. – (No. 01-7662, 2/25/03), a decision entered two weeks after Petitioner's certiorari petition was filed, this Court should remand this case to the United States Court of Appeals for the Third Circuit for further proceedings.

Petitioner's certiorari petition was filed on February 10, 2003 and is scheduled for conference on Friday, March 21, 2003. Petitioner contended that the procedure used to deny his petition for certificate of appealability ("COA") violated the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and F.R.App.P. 22(b)(1), since the district court denied a COA without explanation, App. 17a-18a, and the Third Circuit denied a COA on the ground that he could not obtain relief on the merits.

This Court's decision in *Miller-El*, issued three weeks after Petitioner filed his certiorari petition, squarely applies to Petitioner's case. *Miller-El* requires lower courts to assess whether a COA petition presents claims of *debatable* merit. *Id.*, slip op. at 10. Lower courts are expressly forbidden at the COA stage to decide whether the petitioner can prevail on the merits of his appeal. *Id.* Here, however, the lower courts decided Petitioner could not prevail in his appeal, a determination they "lack jurisdiction" to make at the COA level. *Id.*

For this reason, this Court should vacate the Third Circuit's order denying Petitioner a COA and remand for further proceedings consistent with *Miller-El*.

A. Summary of *Miller-El*

In *Miller-El*, the Fifth Circuit affirmed the district court's denial of the petitioner's COA on the ground that "there was insufficient merit to the case." *Id.*, slip op. at 4. This Court reversed and remanded for further proceedings, finding that the Fifth Circuit applied an incorrect standard of review:

> Before the issuance of a COA, the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional claims. True, to the extent that the merits of this case will turn on the agreement or disagreement with a state-court factual finding, the clear and convincing evidence and objective unreasonableness standards will apply. At the COA stage, however, a court need not make a definitive inquiry into this matter. As we have said, a COA determination is a separate proceeding, one distinct from the underlying merits. *Slack [v. McDaniel]*, 529 U. S. [473], 481 [(2000)]; *Hohn [v. United States]*, 524 U. S. [236], 241 [(1998)]. The Court of Appeals should have inquired whether a 'substantial showing of the denial of a constitutional right' had been proved. Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate.

Id. at 13.

The Court observed that issuance of a COA is a "jurisdictional prerequisite" to appeal, "because the COA statute mandates that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. . . ." *Id.* at 10 (*citing* 28 U.S.C. § 2253(c)(1)). Consequently, "until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Id.* (emphasis added).

The Court defined the appropriate standard of review for COA petitions as follows:

> The COA determination under §2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. *We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason.* This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then

> justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.
>
> To that end, our opinion in *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with §2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner '"has already failed in that endeavor."' *Barefoot [v. Estelle],* [463 U.S. 880,] 893, n. 4 [(1983)].

Id. (emphasis added).

B. Application of *Miller-El* To This Case

Here, the court of appeals did exactly what *Miller-El* prohibits. The court denied Petitioner a COA because it believed Petitioner would not prevail on the merits. App. 1a ("Specifically, appellant has failed to show that there is a reasonable probability that, had the McKeen report and Moran report been disclosed to the defense during the 1995 trial, the result of the proceeding would have been different"). *Miller-El* expressly states that the court of appeals lacks jurisdiction to decide the merits of an appeal at the COA stage. *Miller-El* at 10.

At the COA stage, the court of appeals must limit its inquiry to whether the "district court's application of AEDPA to petitioner's constitutional claims" is "debatable amongst jurists of reason." *Id.* Here, the court of appeals failed to examine whether Petitioner's arguments were debatable, instead engaging in improper merits review.

Not only did the Third Circuit violate *Miller-El*, but the district court did so as well. *Miller-El* requires the court of appeals to "look to the District Court's application of AEDPA to petitioner's constitutional

claims." *Id.* (emphasis added). The district court, however, provided *absolutely no explanation* of its application of AEDPA to Petitioner's claims, or indeed whether it applied the AEDPA at all. It is obvious that the district court committed the same error as the Third Circuit, namely it denied a COA because it believed Petitioner would not prevail on the merits in his appeal.

Absent any AEDPA analysis by the district court, the court of appeals was prevented from determining whether the "district court's application of AEDPA to petitioner's constitutional claims" was "debatable amongst jurists of reason." *Id.* To remedy this error, this Court should remand the instant case to the Third Circuit, which in turn should instruct the district court to examine Petitioner's claims under *Miller-El*'s strictures.

For these reasons, and for the reasons provided in Petitioner's certiorari petition, this Court should issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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DATE: March 14, 2003